IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

No. 123.

THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, as Claimant of the Steamship "Roanoke," APPELLANT,

vs.

T. J. KING and A. WINGE, copartners as KING & WINGE, and W. B. FRASER, APPELLEES.

BRIEF OF APPELLEES

OBJECTIONS TO JURISDICTION OF THIS COURT.

This appeal, which is brought here direct from the decree of the District Court, is sought to be sustained by virtue of the provision in Section 5, of the Judiciary Act of March 3, 1891, that such appeal may be taken "In any cause in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United

States." As counsel for appellant admits, there is no authority in the law for a certificate in this appeal. And it necessarily follows, therefore, that such certificate can furnish no aid to the jurisdiction of this Court. It will be observed that in the appellant's answers to the libels the claim is made, not that the state statutes are void, but that the liens are void, the language of the pleader being that "The lien attempted to be conferred by those statutes is, *in this instance,* void, being in violation" of the constitution (Record, pp. 13, 15). It is not claimed that the lien conferred by these statutes is in *all* cases void, but on the contrary, it is, not only in the answers, but also in appellant's brief, admitted that these statutes and the lien thereby conferred are perfectly valid as applied to domestic vessels. The claim of appellant goes, then, not to the power of the state legislature to enact these statutes, but rather to their proper construction, it being claimed that they must be limited in their application to domestic vessels. That a statute is "in contravention" of the constitution means nothing more or less than that it is invalid. And the words, "The validity of a statute," as used in the Act of Congress of March 3, 1885, (23 Stat. at L. 443) regulating appeals to this Court in certain cases, "refers to the power of congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of legislative power."

Baltimore R. Co. vs. Hopkins, 130 U. S. 210.

Moreover, a record presents no constitutional question for review by this Court in an appeal like this, when it "fails to disclose that a controversy on such subject was called to the attention of the Court below prior to the

hearing, and when it also does not appear that the Court below *considered or necessarily* passed upon an issue of that character." (Italics Ours.)

State of Arkansas vs. Schlierholz, 179 U. S. 598, 601.

The record here fails to show, not only that the lower court necessarily passed upon the constitutional questions urged here, but it fails to show that the court even considered them. Granting, for sake of argument, that appellant in his answers clearly raised these questions, for aught the record shows (no opinion having been filed) the court may not have found their determination necessary in disposing of the exceptions to these answers. The decree recites that these exceptions were sustained and that the appellant declined to plead further and elected to stand upon its answers. (Record, p. 18). It may be that the Court determined that the answers failed to sufficiently allege that the "Roanoke" was engaged in interstate commerce.

If it be said that the answers presented the further question of the invalidity of the statute as depriving the appellant of its property without due process of law, we reply that the appellant has in its brief expressly waived that question, and that to authorize a direct appeal to this court upon a claim of the invalidity of a state statute, "the claim must be real and substantial; a mere claim in words is not enough."

City of Lampasas vs. Bell, 180 U .S. 276, 281.

ON THE MERITS.

Does the statute of Washington violate the commerce clause of the constitution?

It is well settled that the laws of the state in which personal property is situated govern respecting the transfer of title to and liens thereon, even where the owner is a non-resident of the state.

Walworth vs. Harris, 129 U. S. 355.
Brown vs. Smart, 145 U. S. 454.
Pullman Company vs. Pennsylvania, 141 U. S. 32.
The Iris, 100 Fed. 104, 106.
Green vs. Van Buskirk, 5 Wall. 307.
Id., 7 Wall. 139.

In determining the relative power of the states and of congress concerning foreign and interstate commerce, the place of residence of the owner of the instruments of such commerce is wholly immaterial. A vessel is none the less engaged in interstate commerce because her owner resides in one of the states between which such commerce is carried on. Therefore, in considering whether the statute of the State of Washington conferring liens on vessels violates the commerce clause of the constitution, the place of residence of the owner may be laid aside.

The uniform current of decisions of this Court is to the effect that in those respects in which congress has not exercised its power to regulate interstate and foreign commerce, state legislation is valid so long as it affects such commerce only indirectly or remotely.

"As has been often said, legislation (by a state) may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the constitution, unless, under the guise of police regulations, it imposes a direct burden upon in-

terstate commerce, or directly interferes with its freedom."

Kidd vs. Pearson, 128 U. S. 1, and citations.
Lake Shore R. Co. vs. Ohio, 173 U. S. 285, and citations.
Missouri R. Co. vs. Haber, 169 U. S. 613.
Louisville R. Co. vs. Kentucky, 161 U. S. 677.

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States and essentially exclusive."

Wilkerson vs. Rohrer, 140 U. S. 545.

This reserved power in the states is not limited to the right to legislate concerning the public health, morals or safety, but extends also to and includes the power to legislate respecting matters of *mere convenience* and the prosperity of the people.

Lake Shore R. Co. vs. Ohio, 173 U. S. 285.

Counsel in his brief seems to admit this right on the part of the state to legislate as applied to commerce on land, but denies the right respecting commerce by water. There seems to be no just ground for such a distinction. Indeed, the Court, in Railroad Company vs. Maryland, 21 Wallace 456, cited by appellant, said that (Italics ours): "No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although *both its language and spirit embrace commerce by land as well.*" The case in which the language quoted

at the beginning of page 8 of appellant's brief was used, involved the question of taxation by a state, not of the instruments of commerce by water, but of the instruments of commerce by land. But in the later case of Sherlock vs. Alling, 93 U. S. 99, the court used language which we think directly applicable here. That was a suit against the owners of steamboats to recover damages for death, based upon a statute of the state of Indiana. One of the defenses was that the vessels were engaged in carrying on interstate commerce under the laws of the United States and the defendants, as their owners, were not liable for injuries occurring in their navigation, except as prescribed by *those* laws, and that these did not cover the liability created by the Indiana statute. Concerning this defense, Mr. Justice Field, speaking for the Court, said:

"The position of the defendants, as we understand it, is, that as both by the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce. In supposed support of this position numerous decisions of this Court are cited by counsel to the effect that the states cannot, by legislation, place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce; or exacted a license fee from parties engaged in commercial pursuits; or created an impediment to the

free navigation of some public waters; or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned, operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on." After citing cases in support of these assertions the Court further said: "And in all the other cases where legislation of a state has been held to be null for interfering with the commercial power of Congress. * * * the legislation created, in the way of tax, license or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of the parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon congress the regulation of commerce, it was

never intended to cut the states off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. * * * And it may be said, generally, that the Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment the Statute of Indiana falls under this class."

It will thus be seen that the Court draws a distinction between the effect of taxation upon the instruments of interstate commerce, and the regulation of such commerce by other means.

This case has been cited with approval in many subsequent decisions of this Court, some of the more recent of which are:

Missouri R. Co. vs. Haber, 169 U. S. 613, 632.
Louisville R. Co. vs. Kentucky, 161 U. S. 677, 701.
Pittsburgh Coal Co. vs. Louisiana, 156 U. S. 590, 598-9.

Compulsory pilotage laws of a state, while admitted to be regulations of commerce, are held valid so long as Congress refrains from legislating on the subject.

Cooley vs. Board of Wardens, 12 Howard, 299, 320.

Huus vs. Steamship Co., 182 U. S. 392, 393.
The China, 7 Wall. 53.
Ex parte McNeil, 13 Wall. 236.

In the case last cited the Court said:

"A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties the right may be enforced in the proper federal tribunal, whether it be a court of equity, or admiralty, or of common law."

In answer to the contention that the pilotage act of California, which provided that "All vessels, their tackle, apparel and furniture, and the masters and the owners thereof, shall be jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction," was in conflict with the commerce clause of the Constitution, this Court, speaking by Mr. Justice Field, said:

"The power conferred by this clause (commerce clause) is without limitation; it extends to all the subjects of commerce, and to all persons engaged in it; it embraces traffic, navigation and intercourse, and necessarily, therefore, the whole subject of pilots and pilotage, But this clause does not, in terms, exclude the exercise of any authority by the states to regulate pilots."

Pacific Mail S. Co. vs. Joliffe, 2 Wallace 450.

"It seems to be settled in our jurisprudence that so long as congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state regulation, * * * . It would, undoubtedly, be more satisfactory to have a uniform law regulating

such liens, but until such a law be adopted (supposing congress to have the power) the authority of the states to legislate on the subject seems to be conceded by the uniform course of decisions. Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by state laws until congress interposes, and thereby excludes further state legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of state laws."

The Lottawanna, 21 Wallace 558.

The statute of Washington here attacked is general in its terms, applying to *all* vessels, and makes no discrimination against those owned by non-residents. And, as was said by the U. S. Circuit Court, for the District of Washington, in a suit involving this same statute: "There would be no reason or justice in exempting vessels owned by non-residents, when employed within this state, from liabilities and burdens imposed upon vessels having resident owners."

McRae vs. Dredging Co., 86 Fed. 344, 350.

And as was said by the same learned Judge who rendered the decree here appealed from, in an opinion in another cause subsequently decided, involving the identical questions now pressed upon this Court, "Any law which discriminates in favor of non-resident ship-owners is equally as obnoxious to the principles of justice and the requirements of fair trade as a law which discriminates against non-resident ship-owners." * * *

The Robert Dollar, 115 Fed. 218, 221.

It is a sufficient answer to the objection that this statute is unreasonable, in that by its terms the lien conferred continues for a period of three years from the time the cause of action accrues, to say that the record shows that in this instance the liens against the "Roanoke" were asserted by the commencement of these proceedings within five months after the causes of action accrued (Record, pp. 1-7). The record fails to show that this lapse of time was unreasonable. No claim of *laches* on the part of the appellees is made. The answers show that during this period the vessel was in foreign waters, beyond the jurisdiction of the Court. No change in the ownership of the vessel took place. No claim is made that the appellant was without knowledge that the appellees furnished the materials and performed the services set forth in the libel. Nor are any facts set forth in the answers to show that the contractors, at whose instance the appellees furnished the materials and rendered the services, were obligated to pay appellees therefor.

DOES THE WASHINGTON STATUTE INVADE THE JURISDICTION IN ADMIRALTY?

Of course a state statute cannot convert a contract non-maritime in character by the general principles of the maritime law, into a maritime one, for that would be to extend the jurisdiction in admiralty. But it is now well settled that a lien conferred by a state statute as incident to a maritime contract, is, for all practical purposes, a maritime lien, and that such a lien is cognizable in the admiralty.

"The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been

conferred by itself, and consequently upon the same footing as all maritime liens."

The J. E. Rumbell, 148 U. S. 1, 20.
The Glide, 167 U. S. 606.
The Robert Dollar, 115 Fed. 218.

That the contracts set forth in the libels are maritime in character there can be no question. Therefore, even in the absence of the state statute, they were cognizable in the admiralty. How, then, can it be said that the statute has extended the admiralty jurisdiction? True, in the absence of the statute conferring the lien, no proceeding *in rem* could be maintained, but the jurisdiction nevertheless existed. It will not do to confound questions of jurisdiction with those of mere procedure. It has been said by this Court that "The question of the extent of the admiralty jurisdiction of the courts of the United States over cases like that now before the Court became at one time entangled in the question of the effect of the regulation of pleading and procedure in admiralty by this Court under the power conferred upon it by the acts of congress. * * *"

The Glide, supra, p. 612.

The changes made in the twelfth admiralty rule by this court seem to evince a purpose to place vessels, both domestic and foreign, on an equal footing as regards the enforcement of liens, whether arising under the general maritime law or created by state statutes. As originally promulgated, this rule limited the enforcement of local liens to cases of domestic ships, the language of the last clause of the rule being (italics ours): "And the like proceeding *in rem* shall apply to cases of *domestic* ships

where by the local law a lien is given to material men for supplies, repairs, or other necessaries." By a subsequent amendment to the rule, which took effect in 1859, the right to enforce local liens in the admiralty was entirely cut off, and this clause was made to read: "And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, and other necessaries." In 1872 the rule was again amended to read thus: "In all suits by material men for supplies, or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." Speaking of this change in the rule, the Court, in the Robbert Dollar, *supra*, at page 223, said: "There is significance in the fact that when the rule was amended the second time, instead of restoring the original phraseology which limited the application of statutory liens to domestic vessels, the rule was re-cast entirely and the words indicating a distinction between domestic ships and foreign ships were omitted."

In The Lottawanna, *supra*, the Court said of the last change in the rule: "As to the recent change in the admiralty rule referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens existed by law. * * *"

It seems to us that the imposition by a local statute of a lien upon foreign vessels, so long as such lien is *consistent* with the principles of the general maritime law, is no more an invasion of the admiralty jurisdiction than the creation by such statute of a lien upon domestic vessels.

The statutes of New York, which were under consideration in The Chusan, and The Lyndhurst, cited by appellant, were *absolutely inconsistent* with the lien known to the general maritime law in this, that the duration of the liens conferred by such statutes was limited, when in both of those cases the court said that the general admiralty law conferred a lien for the materials there supplied. But in the case at bar it is admitted by counsel for appellant that no lien was conferred by the general admiralty law for the materials furnished and services performed set forth in the libels.

The case of Steamboat New York vs. Rae, 59 U. S. 223, cited by counsel, involved the question of a statute of New York regulating navigation—a subject over which congress had already exercised its authority.

Hall vs. De Cuir, 95 U. S. 585, was a case in which the Court said that the state statute there under consideration imposed a *direct* burden upon interstate commerce, and that "It (the statute) does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within." And in the opinion there the Court cited, with approval, Sherlock vs. Alling, *supra*.

The distinction between the effect in admiralty of local laws which are *consistent* with the principles of the general maritime law, and those which are *inconsistent* therewith, we think, is upheld in Workman vs. New York, 179 U. S. 552. One of the questions involved in that case was whether the maritime law or the local law should govern in determining in the admiralty the liability of a city for an injury caused by a fire boat owned by the city. It was held that by the maritime law the city was liable, and that the local law, which, as construed by the state court,

exempted the city from liability, was not applicable because it deprived parties of rights conferred by the admiralty law. In other words, because it was *inconsistent* with the principles of the admiralty law. Referring to the cases of the J. E. Rumbell, The Lottawanna and The Albert Dumois, which were cited in support of the argument that state statutes were competent to change the general maritime law, even to the extent of depriving parties of rights conferred by that law, the Court said (italics ours):

"True, it is well settled that in certain cases where a lien is given by a state statute, the admiralty courts will enforce rights so conferred when not in *absolute conflict* with the admiralty law. * * * But such cases afford no foundation for the proposition that state laws or decisions can *deprive* an individual of a right of recovery for a maritime lien, which, under the general principles of the admiralty law, he undoubtedly possessed. * * * The cases in question, on the contrary, but illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court. * * *"

We contend, therefore, (1) that this court is without jurisdiction to review these proceedings; (2) that the statute of Washington is not a regulation of commerce within the meaning of the Constitution; and (3) that such statute does not invade the jurisdiction in admiralty. And we ask, therefore, that the appeal be dismissed, or, if this be denied, that the decree appealed from be affirmed with costs.

Respectfully submitted.

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